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In The
Supreme Court Of The United States

October Term, 1952.

No. 192

GEORGE H. TAYLOR,
Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT OF PETITION

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JOHN C. DAVIS,
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INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
Matter Involved	1
Basis for Jurisdiction	7
Questions Presented	7
Reasons Relied on for the Allowance of the Writ	9
BRIEF IN SUPPORT OF PETITION	11
Reference to Report of Opinion Below	11
Previous Decisions Involved in the Main Case	11
Grounds on Which Jurisdiction of United States Supreme Court Is Invoked	11
Statement of the Case	11
Assignments of Error	13
Argument	14
Applicable Decisions of This Court	16
The West Virginia Case	19
The Kentucky Forfeiture Act of 1906	20
Federal Question Presented	22
Conclusion	22

TABLE OF CASES

Bennett v. *Hunter,* 76 U. S., 672, 9 Wall 326	18
Davis v. *Wechsler,* 263 U. S. 22, 68 L. Ed. 143	22
Davison v. *Lewis,* 159 Ky. 998, 169 S. W. 538	8, 13
Eastern Kentucky Coal Lands Corp. v. *Commonwealth,* 111 S. W. 362, 33 Ky. Law. Rep. 857	2
Commonwealth of Ky. v. *Eastern Kentucky Coal Lands Corp.,* 127 Ky. 667, 106 S. W. 260	7, 11, 22
Fairfax's Devisees v. *Hunter's Lessee,* 7 Cranch 602, 3 L. Ed. 453	16
Kentucky Union Co. v. *Kentucky,* 219 U. S. 140, 55 L. Ed. 137	11, 19

Page

King v. *Mullins*, 171 U. S. 404, 43 L. Ed. 214 19
Martin v. *Hunter's Lessee*, 1 Wheat. 303, 4 L. Ed. 97 16
Taylor v. *Carryl*, 20 How. 583, 15 L. Ed. 1029 23
Taylor v. *Commonwealth of Kentucky*, 246 S. W. (2d) 981 11
Taylor v. *Stevenson*, 309 Ky. 68, 215 S. W. (2d) 947 3
United States v. *De Repentigny*, 7 U. S. 627, 18 L. Ed. 645 17
U. S. v. *Lacton*, 110 U. S. 146, 28 L. Ed. 100 23

OTHER AUTHORITIES

Constitution of the United States
Fifth Amendment 7, 8, 9, 11, 13, 14
Fourteenth Amendment 7, 8, 9, 11, 13, 14
Constitution of Kentucky
Section 52 8
Acts of Kentucky Legislature
References to provisions of Forfeiture Act of 1906, i.e., of Act of Legislature of the State of Kentucky entitled, "An Act Relating to Revenue and Taxation," approved March 15, 1906 (C. 22, Art. 3, p. 115):
General reference 8, 11, 13, 21
Sections 1, 2 and 3 2
Section 4 5
Section 7 ..... 3, 5, 20

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PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner, George H. Taylor, by his attorney, Alexander H. Sands, and petitions the Court for a Writ of Certiorari, and presents to the Court the following:

I. MATTER INVOLVED

The suit in which the judgment was rendered, which is here sought to be reviewed, was brought by the Commonwealth of Kentucky in 1907, in the Pike County Circuit Court, against numerous defendants, including the pe-

titioner, George H. Taylor, seeking to forfeit the title of such defendants in the land described in the petition, upon the ground that the defendants had failed to list the property for taxation and pay the taxes thereon in compliance with provisions of Article 3, Chapter 22, of the Act of 1906, (Ky. Statutes, 1936 Edition, Section 4076b to 4076k, inclusive, relating to the assessment of old land grants), and on February 14, 1908, a judgment of forfeiture was entered (R. p. 187, et seq.); the judgment of the Court further found that defendants had failed to list for assessment and taxation lands described in the petition, including Tract No. 21, known as the Benjamin Haskell Grant, fully set out in the judgment so rendered. There appears to have been no finding by the Court of the amount of taxes respectively due by the sundry defendants concerned, nor any mention made in said order for the selling of the land or any part of the same as prayed for in the petition of the Commonwealth and as provided for in the statute or act passed by the Legislature of Kentucky under which the proceeding was instituted.

Several of the defendants appealed from the judgment so rendered by the Pike County Circuit Court, and upon the state of the record as of that date the Court of Appeals of Kentucky affirmed the judgment (R. p. 206), the case on appeal being reported under the title of *Eastern Kentucky Coal Lands Corporation* v. *Commonwealth,* 111 S. W. 362, 33 Ky. Law Rep. 857, and from this decision this case, including two others of cognate relationship, was carried to and affirmed by this Court at the October Term, 1911, the final mandate being certified to the Court of Appeals of Kentucky, found in the Record herein at page 206.

The order entered in the chancery proceeding appealed

from, as related, was the only order entered by the Circuit Court, and this concluding order, found in the record at page 187 et seq. did not close the matter involved in the litigation, the Court reserving in its concluding paragraph an express reservation in this language:

> "All other questions not herein specifically adjudged are reserved for future adjudication. To this judgment the defendant, Eastern Kentucky Coal Lands Corporation and C. B. Hillhouse, objects and excepts."

Petitioner's Motion

Such being the state of the record, on May 10, 1947, the petitioner, a defendant in the pending suit, as stated, filed a motion in the Pike County Circuit Court asking for an order of sale of the tract of land in which he was interested, described in the petition as Tract No. 21, known as the Haskell Grant, notice of such application and motion being given to J. A. Runyon, Commonwealth's Attorney of the Thirty-fifth Judicial District, Pikeville, Kentucky, a successor in title to the Commonwealth's Attorney who instituted this suit in 1907, then acting as the official representative designated in the Forfeiture Act of 1906 (R. p. 111-112). The then acting Commonwealth's Attorney made sundry objections to the motion so made by the petitioner herein (R. p. 4, 11). The Court overruled the motion on the ground that such was barred by the statute of limitations and by laches; whereupon, the petitioner brought a mandamus proceeding against the Judge of Pike County Circuit Court to require him to enter an order of sale. This proceeding was disposed of by the Court of Appeals of Kentucky on the 15th day of October, 1948, in the pending matter of *Taylor* v. *Stevenson,* 309 Ky. 68, 215 S. W. (2d) 947. The opinion by Stanley, Commissioner,

denied the petitioner herein the relief prayed for in such mandamus proceeding, although the pleadings presented all issues now involved in the case, the Court basing its judgment solely upon the technical point that the petitioner should have appealed from the order overruling his motion for sale rather than applying for a writ of mandamus. The Circuit Judge in this proceeding was not represented by the officers of the State, the then Attorney General A. E. Funk and Commonwealth's Attorney J. A. Runyon, but by Hobson and Scott, of Pike County, Kentucky, who were also of counsel in the Court of Appeals subsequent thereto.

While the merits of the case were fully presented in the mandamus proceeding, as stated, the opinion of the Court carried no suggestion that the right of appeal was not open to the petitioner, and the petitioner promptly filed a petition for appeal, such being filed on the 28th day of February, 1949, the case being submitted to the Court for decision in September, 1949.

An Unanimous Decision for Petitioner

As will appear from the Record, on December 1, 1950, the Court of Appeals of Kentucky entered its final order, carrying this terse language:

> "The judgment is reversed with directions to sustain appellant's motion for an order of sale."

The unanimous opinion of the Court, prepared and submitted by Rees, Justice, is found in the Record, page 42. The opinion reviews the case briefly and, in passing upon the merits, concluded as follows:

> "* * * * The statute gave the former owner or claimant alternative rights; that is, the right to redeem

> under Section 4 or the right to share in the proceeds of the sale required by Section 7 in the case of no redemption. We think this right is a substantive one, and cannot be taken away by repeal of the statute. Appellant did not elect to redeem the land under the provisions of Section 4 of the forfeiture act, and the time for redemption has expired. If he is deprived of his alternative right, then he is deprived of his property without due process." (R. 47).

Under the procedure prevailing in the State of Kentucky, the judgment would have become final within thirty (30) days from its rendition, namely, on January 1, 1951. In the present instance an extension of time was extended appellee upon the suggestion of its desire to file a petition for rehearing and on January 26, 1951, the appellee's petition for rehearing, found in the Record, commencing at page 24, was filed. This petition for rehearing so filed on behalf of the appellee, the Commonwealth of Kentucky, was signed by A. E. Funk, Attorney General of Kentucky, J. A. Runyon, Commonwealth's Attorney of the Thirty-fifth Judicial District of Kentucky, and Lee Wright Browning, of Ashland, Kentucky, who appeared for the first time in the case.

The Record shows that the further consideration of the case was continued until it finally came before the Court after a motion for oral hearing had been made on behalf of the appellee on the 13th day of November, 1951, at which time counsel appearing for the State of Kentucky being Lee Wright Browning, of Ashland, Kentucky. The cause was argued orally, on behalf of the appellee by him.

Final Decision Against Petitioner

The cause, having been argued, was taken under consideration by the Court until December 6, 1951, at which time, as shown by the Record, pp. 49-50, the previous order of December 1, 1950, was withdrawn, and by unanimous Court as then constituted, save Combs, J., not sitting, in an opinion by Stanley, Commissioner, the Court again expressed its previous views and findings as to the legal and factual status of the appellant but sustained the trial court's ruling solely upon the ground of laches, the opinion of the Court concluding in the following language:

> "Our conclusion of the whole matter is that the *failure of the appellant, George H. Taylor, to assert within a reasonable time his claim of right to have the unredeemed portions of the land sold and further proceedings taken under the judgment of forfeiture entered February 4, 1908, estops him from doing so now.* The trial court, therefore, properly overruled the motion." (R. 59-60) (Italics Supplied).

The costs of the proceeding in the appellate court are placed upon Taylor. The Court makes neither disposition nor suggestion as to what disposition the lower court shall make respecting the unredeemed portions of the lands involved in the Grant; the costs incurred in the lower court; who and how these vacant lands can be taxed or disposed of under existing laws of the State of Kentucky, or what method the officers of the State may follow, either with or without the aid of the County Court, to collect delinquent taxes due by Taylor and others secured upon such lands under the Forfeiture Act.

The petitioner filing a petition for re-hearing (R. 60-61), the same was overruled by the Court of Appeals of Kentucky on March 23, 1952 (R. 139), and the time

for filing this petition was extended to and including July 15, 1952 (R. 209).

The purpose of this petition is to have this Court review the decisions of the Courts of Kentucky in this matter, and to reverse the same as being contrary to the provisions of the Federal Constitution which guarantee and protect the Petitioner in the enjoyment of his legal rights as herein set out.

II. BASIS FOR JURISDICTION

The Petitioner states that the basis for the jurisdiction of the Supreme Court of the United States to review the decision of the Courts of the State of Kentucky is 28 U. S. C. 1257 and 2101.

III. QUESTIONS PRESENTED

1. Does the final decision of the Court of Appeals of Kentucky deprive petitioner of substantial property rights without due process of law, in contravention of the 5th and 14th Amendments of the Constitution of the United States?

2. Does the decision complained of ignore the mandate of the statutes of the Commonwealth of Kentucky as to the procedure to be followed in such cases, upon which the constitutionality of the forfeiture acts has been determined by this Court and other courts to rest?

3. Does the decision here sought to be reviewed deprive the Commonwealth of Kentucky of its right to collect taxes upon certain property involved in the pending cause of *Commonwealth of Kentucky* v. *Eastern Kentucky Coal Lands Corp., etc.,* in which the petitioner is a defendant,

and does such decision ignore the statutory mandate that certain lands, including those of the petitioner herein, should be disposed of through sale by the Court, according to the express terms of Kentucky Act 1906; Article 3, Chapter 22, and is such decision here sought to be reviewed in direct contravention of Section 52 of the Kentucky Constitution forbidding the releasing or waiving of taxes or tax liens by any state officer or agency; and does such decision deprive the petitioner herein of those property rights in the residue of proceeds of sale, which have not been denied other owners of titles forfeited under identical circumstances?

4. Does the decision so sought to be reviewed violate the rights of the petitioner as recognized by the Court of Appeals of Kentucky in its decision in the case of *Davison* v. *Lewis,* (159 Ky. 998, 169 S. W. 538), when approving a sale under the identical conditions and circumstances as are here presented in the petitioner's motion?

5. May the State of Kentucky abandon further procedure under the Acts involved, including the subsequent provision for the sale of such land owned by the petitioner, after it elected to acquire the lands of the petitioner and others through an equity proceeding such as here involved, and having in such equity proceeding secured a judgment of forfeiture against the petitioner *and his land,* as authorized under the Act of 1906 (R. 188), such lands or property thereupon, upon the rendition of the judgment, having become property *custodia legis?*

6. Does such conduct on the part of the State of Kentucky acting through those officers in the premises deprive the petitioner of the enjoyment of those rights guaranteed, and secured to him under the 5th and 14th provisions of the Federal Constitution?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons relied on by the Petitioner for the allowance of the writ are, as heretofore pointed out, and presented in the foregoing questions, that he has been deprived of his property and property rights, without due process of law as guaranteed to him under the Fifth and Fourteenth Amendment of the United States Constitution; and that the decision of the Court here complained of presents federal questions of substance either not heretofore determined by this Court or that have been decided adversely in express applicable decisions of the United States Supreme Court.

ALEXANDER H. SANDS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Reference to Report of Opinion Below

The same case is reported in 246 S. W. 2d 981.

Previous Decisions Involved In The Main Case

Eastern Kentucky Coal Lands Corporation v. *Kentucky*, 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 55 L. Ed. 137.

First decision in the instant case (accompanying Record pp. 42-47).

Grounds On Which Jurisdiction Of U. S. Supreme Court Is Invoked

Petitioner contends that the Pike Circuit Court, of Kentucky, in refusing to enter an order of sale upon his motion in the pending suit of *Kentucky* v. *Eastern Kentucky Coal and Land Corporation* (R. p. 19) and the Kentucky Court of Appeals in affirming the judgment of the Circuit Court thereon (R. p. 49) deprived the petitioner of constitutional guarantees accorded to him under the Fifth and Fourteenth Amendments to the Constitution of the United States, and that the basis for jurisdiction is 28 U. S. C. 1257 and 2101.

Statement Of The Case

The Petitioner admits as a matter of course that the Kentucky forfeiture act of 1906 (Chapter 22, Acts 1906, Ky. Statutes 1936 Ed. 4076b to 4076k) is constitutional

as held by this Court in the pending case of *Eastern Kentucky Coal Lands Corporation* v. *Kentucky, supra,* and he relies upon the construction placed by this Court upon the Act as expressed by Mr. Justice Day. It is the contention of the Petitioner that the Legislature of Kentucky, when passing the Forfeiture Act, contemplated, as its terms expressly state, that any Court entertaining jurisdiction of a cause brought under the Act would conduct such cause to a conclusion, including the disposition of the property involved through sale or otherwise, as was expressly provided in such Act.

There is no issue of fact involved! No dispute as to title of land.

As will appear from the early stages of this particular proceeding, as disclosed by the Record, the officers of the Commonwealth interposed many objections to the Petitioner's request for sale in the Circuit Court. (R. pp. 4-21, incl.). The Commonwealth's Attorney, charged under the terms of the statute with the duty to proceed with the cause *until final judgment* (Section 3 of the Act, as paraphrased by Mr. Justice Day), 55 L. Ed., at p. 151, even tried to block the proceeding in the Circuit Court by objecting to the substitution of the lost record. The Commonwealth's Attorney moreover denied that the Petitioner had any interest in the subject matter of the suit, although it was shown that he was a defendant in the original cause. These issues, however, were disposed of in the progress of the litigation, as well as various others urged in the name of the Commonwealth of Kentucky in the "Petition for Rehearing," filed in the Court of Appeals of Kentucky *after the Court had rendered its opinion favorable to the Petitioner on December 1, 1950.* (R. p.

24). Hence, as the case stands in this Court, the single issue presented is whether the constitutional right of a litigant can be lost through application of the suggested doctrine of *Equitable Estoppel*, in any case, but particularly in a forfeiture proceeding instituted against the litigant by a State, pursuant to a forfeiture act, under the terms of which the duty to go forward is placed upon the State—not the property owner. This question, a Federal question, we assert has never before been presented to this Court for determination.

Assignments Of Error

The Petitioner assigns as error:

1. The Court of Appeals of Kentucky erred in not sustaining the Petitioner's motion for the sale of the Grant involved, as provided under the Kentucky Forfeiture Act of 1906, (Chapter 22, Acts 1906), Ky. Stat. 1936 Ed., Sections 4076b through 4076k, his right thereunder to a sale being secured to him under the Fifth and Fourteenth Amendments to the United States Constitution.

2. The Court of Appeals of Kentucky erred in not sustaining the motion for the sale of the Grant involved, the right to such sale under the facts, as disclosed in the record, having been held to be legal and demandable by said Court in its former decision in the case of *Davidson* v. *Lewis*, 159 Ky. 998, 169 S. W. 538, when there invoked by a taxpayer of Kentucky under the identical statute here involved.

3. The Court of Appeals of Kentucky erred in not sustaining the motion for sale of the Grant involved, after this Court had in this very case approved of the procedure

set forth in the Act which granted t the petitioner the right of sale where forfeiture was so ht by the State in such proceedings.

4. The Commonwealth of Kentuck having proceeded under the Act involved to secure the ree of forfeiture on February 14, 1908, (R. p. 187) itioner's property immediately, as a consequence thereof, ssumed a status of property in *custodia legis* (*Taylor* v *Carryl*, 20 How. 583), and such rights and privileges a the petitioner had in the premises could only have been sposed of through judicial action in the cause.

The decision of the Court of Appls of Kentucky in this case violates the rights of your pe tioner, in that such deprives him of his property without ue process of law, and in contravention of the Fifth and ourteenth Amendments to the Constitution of the Unit States; and such decision of the Kentucky Court is ntrary to decisions of this Court in respect thereof.

ARGUMENT

It is submitted that in reaching conclusion on the merits of this case it is unnecessar to go beyond the decisions of this Court, insofar as te principles of law applicable are concerned. Under th decisions of this Court it is perfectly clear that the Petitioner was entitled to have the property involved sold, as contemplated under the terms of the statute. The questio is as to whether or not this privilege could be taken aw y from him by the State of Kentucky through its non ompliance with the terms of the law of its own enactment. The practical question being whether the State of Kentucky, acting through its officers, could abandon he proceedings after

judgment of forfeiture had been secured at its instance, and then subsequently block or thwart the Petitioner in securing a sale under an act of its own creation. The right was substantial, and such a right as is protected under the amendments to the Federal Constitution, upon which we here rely, as was so held by the Court of Appeals of Kentucky in its first decision (R. pp. 42-50).

In America we have neither "XY?" papers in State documents nor unknown parties in litigation. The only parties concerned in this matter are those designated in the forfeiture statute under consideration. Chief Justice Orear pointed these parties out with due emphasis when rendering his opinion in the early stages of this case, as reported in 100 S. W. 200-207. The parties concerned were those who, including the Petitioner in the instant case, who held the legal property rights through the original patentees. On the other side were those who held a moral right, and had bought and settled in ignorance of the true conditions prevailing, obviously meaning those who had acquired title within the grants specifically specified under the Act. The third party in interest necessarily was the State of Kentucky, who was interested in collecting its taxes and having unidentified lands placed upon the land books. These were the only parties concerned. Consequently, if there is no sale as provided under the statute none of the parties who were embraced within the Act would secure anything at all! The legitimate tax paying individuals within the grant *could* only have their boundaries definitely fixed *through* a sale; those claiming under the original patentees could only obtain their rights *by* a sale, while the status of the State of Kentucky would remained unchanged, as bare forfeiture, without *investment* or *reunion with other public domain* belonging to the

State, would make no change in its economic or acreage status.

An actual change such as was contemplated by the Act can, according to the decisions of this Court, only take place through a sale or sequestration such as would have been effected at common law through "office found".

Applicable Decisions Of This Court

The law of the case which prohibits the Legislature directly *proprio vigore* or indirectly through Court proceedings which does not furnish the equivalent of the common law requirement of *office found* when attempting to take on behalf of the crown or its successor, the American commonwealth, was clearly and definitely considered in the two cases which reached this Court growing out of the purchase by Chief Justice Marshall and his brother of the Fairfax grants, these cases being *Fairfax's Devisees* v *Hunter's Lessee* (1813) 7 Cranch 602, which reversed the Supreme Court of Appeals of Virginia (1810), and *Martin* v. *Hunter's Lessee* (1817) 1st Wheaton 317, *et seq.*

The importance of these cases, aside from the principles of law involved, was unusual. They both were of vital importance to the persons concerned and to the nation at large.

As the members of this Court will recall, the principal issue presented was identical with the issue here presented, namely, as to the first and secondary right of the king or commonwealth in lands sought to be acquired through forfeiture. The simple question presented in both cases concerns the determination whether the requirement of due process has been provided for in an act of Forfeiture,

i. e., the equivalent of *office found* as known at common law.

The land concerned, being those purchased by Marshall, had been declared illegal by the Virginia Court in an opinion by its president, Roane, who had been slated by Jefferson to become Chief Justice before Adams intervened and appointed Marshall. When the case reached this Court Marshall, of course, not sitting, the opinion was written by Mr. Justice Story. He held, that the Virginia legislative Act was unconstitutional in that it had not followed the requirements of office found. The Virginia Court refusing to obey the mandate of this Court, gave rise to the second case where Story re-affirmed his former decision as to the procedural question presented, and then took up the important constitutional question involving the jurisdiction of this Court under Article 3 of the Constitution.

These decisions of Mr. Justice Story have been consistently followed by this Court.

In *United States* v. *De Repentigny*, 72 U. S. 627 (1867) at page 646, the Court, speaking through Mr. Justice Nelson said:

> "But we do not intend to put this branch of the case on this ground. The United States succeeded to all the rights to this territory that existed in the King of France, under the Treaty of 1783, with Great Britain, at the close of the Revolution. The United States then became the lord paramount of this seigniory, and were thereby invested with the power to deal with the seignioral estate, the same as the King of France, had it continued under his dominion; and we agree that, before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found or its legal equivalent. A legislative Act directing the possession and appropriation of the

land is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings. *Fairfax* v. *Hunter*, 7 Cranch, 603; *Smith* v. *Maryland*, 6 Cranch, 286. In the present instance we have seen what the laws have been extended over this tract, the lands surveyed, and put on sale, and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come in before a Board of Commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found."

The question at issue was again presented to the Court in the case of *Bennett* v. *Hunter* (decided in March 1870) opinion by Chief Justice Chase. After quoting at length from the case just cited he continues with this language (76 U. S. 672, 9 Wall. 326):

"* * * Without pausing to inquire whether, in any case, the title of a citizen to his land can be devested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction." (Citing *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 625). In the case of lands forfeited by alienage the King could not acquire an interest in the lands except by inquest of office. 3 Bl. Com., 258. And so of other instances where the title of the sovereign was derived from forfeiture. And in the case of *United States* v. *Repentigney*, 5 Wall., 265, 18 L. Ed. 645, where the forfeiture to the government of lands arose from omission to perform the conditions of the grant, this

court held that before the forfeiture could be consummated by re-union of the land with the public domain, 'a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent,' should take place. The court said further that 'a legislative Act directing the possession and appropriation of the land is equivalent to office found.'

Applying these principles to the case in hand, it seems quite clear that the first clause of the 4th section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely: non-payment of taxes, while the second clause was intended to work the actual investment of the title through a public Act of the Government in the United States, or in the purchaser at the tax sale. The sale was the public Act, which is the equivalent of office found. What preceded the sale was merely preliminary, and independently of the sale, worked no devestiture of title. * * * ."

The West Virginia Case

A comparison of the factual background between *King* v. *Mullins,* 171 U. S. 404, 43 L. Ed. 214, and *Kentucky Union Co.* v. *Kentucky, supra,* is interesting on the point considered. In the *West Virginia case* the constitution of 1872 had attempted to take possession through forfeiture directly, the constitution declaring forfeiture and carrying title to its school fund but the act of consummation, the transfer of the individuals' property to the Commonwealth, in its entirety had not been consummated. Then followed the legislative act under which the case arose. It is in this case that the distinction is pointed out in the learned

opinion by Mr. Justice Harlan when he emphasizes the importance of *the sale.* We quote from the official edition, 171 U. S. page 434:

> "It is said that the landowner will be without remedy if the commissioner of the school fund should fail to institute the proceeding in which the statute permitted such owner to intervene by petition and obtain a redemption of his lands from the forfeiture claimed by the state. It cannot be assumed that the commissioner will neglect to discharge a duty expressly imposed upon him by law, nor that the courts are without power to compel him to act, where his action becomes necessary for the protection of the rights of the landowner."

When the Kentucky legislators, a few years after the decision in the *West Virginia case,* drafted the present Act they left nothing for surmise or doubt, but to the contrary they accepted and adopted the procedure of a chancery cause which held the repeated approval of this Court.

The Kentucky Forfeiture Act Of 1906

Section 7 of the Forfeiture Act provides:

> "All title and claim to land transferred to, and vested in, the Commonwealth under the provisions of this article and not purchased back by the owner or claimant, as provided by section 4, and not vested in the occupant, as provided in section 6, SHALL *be sold to the highest and best bidder for cash in hand. Said sale shall be made pursuant to a judgment of the Circuit Court in said action, and shall be at public auction at the front door of the courthouse on the first day of some regular term of the Circuit Court, after notice of sale shall have been advertised in the*

*manner required by law in the case of the sales of land under execution. * * * .*" (Italics supplied).

The statute then provides how and to whom the deed shall be made.

Judge Day in his opinion in the *Eastern Kentucky Coal Land case, supra,* refers and comments again and again upon the machinery set up by statute to meet the inhibitions imposed by common law and the Constitution of the United States to meet the requirement of *due process of law.*

Furthermore, if we pass by for the moment consideration of the rights of the petitioner, Taylor, what about the rights involved of the Commonwealth of Kentucky? There is not a suggestion in the statute in any place for the creation of a reservoir for taking or holding these vacant lands which are not on the tax books and not open to other applications for land grants; and not belonging to or taxable with the lands of legitimate property owners whose lands are to be confirmed *quoad* the acreage involved in such lands, under the forfeiture statute. It is these lands and these lands alone which are required to be sold under the statute in order to adjust the rights of the parties to collect taxes due the State of Kentucky, and to pay unto the title holder such sum as may be due him in the sequestration proceeding.

From the foregoing review it would seem clear that it was the purpose of this Court in deciding the *Eastern Kentucky Coal Lands case, supra,* not only to construe the Forfeiture Act of 1906 as to its constitutionality, but to also establish by its decision all rights of the litigants involved in that cause. It is submitted that this Court did not intend to afford the Commonwealth of Kentucky the right to deprive petitioner of his rights under the Act by

permitting the Commonwealth to abandon the cause rather than following it through to a conclusion.

Federal Question Presented

The Federal question presented in this petition was first assumed and passed on in the preceding stage of the pending cause which reached this Court under the style of *Commonwealth of Kentucky* v. *Eastern Kentucky Lands Corp.*, (219 U. S. 140). The Federal question was again presented to the state court and there considered and passed upon, in the present proceeding, as shown in the first decision of the Court of Appeals of Kentucky rendered on December 1, 1950, such being plainly established by the opinion of Justice Rees (R. p. 42), and such was again presented to the state court in the petition for rehearing filed on behalf of Mr. Taylor (R. p. 64), such presentation being then timely and appropriate under existing circumstances. It is confidently submitted, therefore, that what might seem to be an effort of the Court of Appeals of Kentucky when rendering its second opinion in the present case as intimated in the opinion of Commissioner Stanley, found in the citation, 246 S. W. 2d 981-988, must here be regarded as arbitrary or at least as a device to prevent or thwart the review of the important Federal question now presented to the Court. *Davis* v. *Wechsler*, 263 U. S. 22. It is not believed that any reasonable or even plausible argument can be advanced in the name of the Commonwealth of Kentucky upon the grounds mentioned.

It would seem unthinkable that the State of Kentucky should in this case, where it has sought and secured a favorable ruling as to the constitutionality of the Act concerned relying upon certain liberal provisions in the Act as justifying a favorable decision, should subsequently,

when the rights of the litigant depend upon such liberal provisions, take the position that no Federal question had been presented in the state court when passing upon the issues involved.

Furthermore, the sole ground relied upon by the state court for the denial of Mr. Taylor's conceded right to demand a sale which was previously approved by the state court being laches, 246 S. W. 2d, 988; and under the facts of the case and the pleadings thereof, if such a defense can be considered at all, such must be considered as an integral factor which would necessarily turn upon the question as to whether or not the petitioner had been deprived of his property by due process. This point has definitely been decided by this Court in the case of *U. S.* v *Lawton,* 110 U. S. 146, 128 Law Ed. 100, and in the case of *Taylor* v. *Carryl,* 20 How. 583-617, 15 Law Ed. 1024. Obviously when the State of Kentucky secured judgment of forfeiture the land and the rights in the land so acquired became in *custodia legis* and the Commonwealth of Kentucky as the plaintiff in the cause was charged through its officers to so conduct the litigation under its control until the Court had administered the fund or properties acquired by the Court.

For a full discussion of the doctrine of laches and the reason it can have no application here the Court's attention is respectfully directed to that section of Petitioner's Petition for a re-hearing found on pp. 77-86 of the Record.

CONCLUSION

For reason stated herein and in Petitioner's Petition it

is respectfully suggested that a writ of certiorari should issue.

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Office - Supreme Court, U.
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AUG 21 1952
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Supreme Court of the United States

OCTOBER TERM, 1952

NO. 192

GEORGE H. TAYLOR *Petitioner*

VS.

COMMONWEALTH OF KENTUCKY *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STANDARD PTG. & PUB. CO., INC.
PRINTERS, HUNTINGTON, W. VA.

INDEX OF BRIEF

Pages

I

Statement 1-4

II

No grounds exist for the granting of certiorari 4, 5

III

Merits of the case 5-7

TABLE OF CASES

Eastern Kentucky Coal Lands Corp. v. Commonwealth, 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138 ..... 1, 2

Eastern Kentucky Coal Lands Corp. v. Commonwealth, 111 S. W. 362, 33 Ky. L. Rep. 857 ..... 1, 3

Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243, U. S. 157, 61 L. Ed. 644 5

Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. Ed. 510 5

Kentucky Union Co. v. Commonwealth, 128 Ky. 610, 108 S. W. 931, 110 S. W. 398 1

Kentucky Union Co. v. Commonwealth of Ky., 219 U. S. 140, 55 L. Ed. 137 ..... 1, 2, 3

Marrow v. Brinkley, 129 U. S. 178, 32 L. Ed. 654 5

Moran v. Horsky, 178 U. S. 205, 44 L. Ed. 1038 ..... 4-5, 6

Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 Fed (2) 871 (cer. den. 320 U. S. 800) 1

Pierce v. Somerset Railway, 171 U. S. 641, 43 L. Ed. 316 5

Preston v. City of Chicago, 226 U. S. 447, 57 L. Ed. 293 5

Taylor v. Commonwealth, 246 S. W. (2) 981 ..... 4, 5

Taylor v. Stephenson, 309 Ky. 68, 215 S. W. (2) 947 4

Wood v. Chesborough, 228 U. S. 672, 57 L. Ed. 1018 5

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This proceeding is a belated sequel to the litigation which was before the Court of Appeals of Kentucky in *Eastern Kentucky Coal Lands Corporation v. Commonwealth, 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138*, and *Eastern Kentucky Coal Lands Corp. v. Commonwealth, 111 S. W. 362, 33 Ky. L. Rep. 857*, and which (with the related case of *Kentucky Union Company v. Commonwealth, 128 Ky. 610, 108 S. W. 931, 110 S. W. 398)* was determined by this Court in *Kentucky Union Company v. Commonwealth of Kentucky, 219 U. S. 140, 55 L. Ed. 137.* A subsequent chapter was written by the Court of Appeals, Sixth Circuit, in *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 Fed. (2) 871* (cer. den. *320 U. S. 800, 88 L. Ed. 483).*

The petition for certiorari necessitates a consideration of the provisions of the so-called Forfeiture Act of 1906 of the Legislature of Kentucky (Art. 3, Chap. 22, Acts of 1906, Sections 4076b to 4076k, Ky. Stats. 1936 Edition). The details of the statute are fully set out in *219 U. S. 140, 31 S. Ct. 171, 55 L. Ed., 137*, and in *127 Ky. 667, 106 S. W. 260*, and its objects and purposes are fully discussed in the latter case. It is sufficient to here state that old land grants of Virginia and Kentucky had for years stifled industrial development of the eastern part of Kentucky, and its minerals and forests could not be made available for its people until its land titles in this area were stabilized; the courts, under their common law and equity powers, had been impotent to overcome the chaos caused by the overlapping and conflicting paper titles to the lands in the eastern part of the Commonwealth and the legislature proposed to use the power of the state to forfeit lands for the nonpayment of taxes as a means to eliminate this evil. The aforesaid Act of 1906 was the result. The constitutionality of the Act was upheld by the Court of Appeals of Kentucky and by this Court in the above cited cases.

The instant proceeding grows out of the suit which was filed in the Circuit Court of Pike County, Kentucky by the Commonwealth of Kentucky under the provisions of the aforesaid Act of 1906, for the purpose of forfeiting numerous old Virginia land grants, among them the so-called Haskell grant which covered approximately 300,000 acres of land in Pike and other counties of Eastern Kentucky. A judgment of forfeiture was entered in this case on Feb-

ruary 14, 1908 (pp. 187-205, R), which judgment was affirmed by the Court of Appeals of Kentucky *(111 S. W. 362, 33 Ky. L. Rep. 857)* and by this Court *(219 U. S. 140, 31 S. Ct. 171, 55 L. Ed. 137)*.

On May 10, 1947 (thirty-nine years after the entry of the aforesaid judgment of forfeiture) the petitioner, Taylor filed in the Pike Circuit Court his motion (p. 3, R) asking for an order of sale of the tract of land described in the petition as Tract No. 21, and known as the Haskell patent (p. 159, R), one of the grants forfeited to the Commonwealth of Kentucky by the judgment of February 14, 1908 (p. 204, R). This motion was based on Section 7 of the Act of 1906 which Section provided for the sale of all title and claim to the land forfeited to the Commonwealth, which was not purchased back by the owner or claimant under the provisions of Section 4 of the Act, *or which was not vested in the occupant of the land as provided in Section 6 of the Act;* it was further provided by Section 7 that the money realized from such sale should be first applied to the payment of the costs of the original suit, then to the payment of the state and county taxes with interest and penalties, and the remainder to the former owner or claimant. It should be here emphasized that from the date of the entry of the judgment in the original action (February 14, 1908) until the filing of the aforesaid motion for an order of sale on May 10, 1947, no steps of any kind were taken in the case and in 1911 it was stricken from the docket of the Pike Circuit Court.

The motion for an order of sale was overruled by the Circuit Court on May 6, 1947 (p. 19, R.), whereupon the petitioner herein brought mandamus

proceedings in the Kentucky Court of Appeals against the judge of the Pike Circuit Court to require him to enter the order of sale, but mandamus was refused as not being the proper remedy,—see *Taylor v. Stephenson, 309 Ky. 68, 215 S. W. (2) 947.*

Thereafter an appeal was taken to the Court of Appeals from the order of the Circuit Court. On December 1, 1950, the Court of Appeals handed down an opinion reversing the Circuit Court with directions to sustain the motion for an order of sale (pp. 42-47, R). On rehearing, this opinion was withdrawn and on December 6, 1951, the Court of Appeals affirmed the ruling of the Circuit Court, that opinion being reported in *246 S. W. (2) 981*, and reprinted in the record herein at pp. 49-60.

I

NO GROUNDS EXIST HEREIN FOR THE GRANTING OF CERTIORARI

The ruling of the Court of Appeals of Kentucky, to which the petition for certiorari is directed, was based entirely upon the ground that the failure of the petitioner to assert, within a reasonable time, his claim of right to have the land sold and further proceedings taken under the judgment of forfeiture entered thirty-nine years previous to the filing of the motion, constituted an estoppel. Such decision involved only the construction of a state statute, and the determination of the law of the state, i. e., whether the asserted right of the petitioner was barred by the defense of laches. Such determination involves no substantial federal question. It was so held in *Moran v.*

Horsky, 178 U. S. 205, 44 L. Ed. 1038, wherein Mr. Justice Brewer wrote:

> "The supreme court of the state affirmed the decree of the trial court primarily on the ground of laches. If this be an independent ground, involving no question under the Federal statutes, the decision of the supreme court must be sustained and the writ of error dismissed."

To the same effect are *Pierce v. Somerset Railway, 171 U. S. 641, 43 L. Ed. 316; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. Ed. 510; Preston v. City of Chicago, 226 U. S. 447, 57 L. Ed. 293; Wood v. Chesborough, 228 U. S. 672, 57 L. Ed. 1018; Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U. S. 157, 61 L. Ed. 644; Marrow v. Brinkley, 129 U. S. 178, 32 L. Ed. 654.*

It is submitted that there exists herein no ground for certiorari under either *Section 1257, Title 28, U. S. C. A.*, or *Rule 38, Supreme Court Rules.*

II

THE MERITS OF THE CASE

Independent of the question of jurisdiction, it is manifest that there is no error in the ruling of the Court of Appeals of Kentucky. The facts that call for the application of the defense of laches are so fully and convincingly set out in the opinion of the Kentucky court *(246 S. W. (2) 981, 986)*, that further elaboration is unnecessary.

The rule applied by the Court of Appeals was stated by this Court in *Moran v. Horsky*, supra, as follows:

> "Indeed, if the matter of laches can be recognized at all, it is difficult, independently of the question of jurisdiction, to perceive any error in the ruling of the state supreme court. One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. See, among others, Felix v. Patrick, 145 U. S. 317, 36 L. Ed. 719, 12 Sup. Ct. Rep. 862; Galliher v. Cadwell, 145 U. S. 368, 36 L. Ed. 738, 12 Sup. Ct. Rep. 873, and cases cited in the opinion. There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity, and the present case fully illustrates that proposition."

Apparently, it is the contention of the petitioner that he has been deprived of his right to demand a sale of the forfeited land without *office found*. But such right was not destroyed by any act of the respondent; it was lost as the result of the petitioner's own inactivity and neglect, i. e., his failure to assert such right for a period of thirty-nine years. As was succinctly said in the last cited case, "a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce".

It is to be noted that the Kentucky court expressly held that the petitioner's admitted original right to have demanded a sale of the forfeited land "could not be abrogated or extinguished" by the subsequent repeal of the Forfeiture Act of 1906. This was the only possible federal question involved in the case, and it was decided in favor of the petitioner.

For the foregoing reasons it is respectively submitted that the petition for writ of certiorari herein should be denied.

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FILED
OCT 27 1952

In The
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No. 192.

GEORGE H. TAYLOR
Petitioner

versus

COMMONWEALTH OF KENTUCKY
Respondent

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI

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In T
Supreme Court Of T United States

No. 19

GEORGE H. TAYLOR
Petition

versus

COMMONWEALTH OF KENTUCKY
Respondent

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI

Comes now the Petitioner, George H. Taylor, by Alexander H. Sands, his counsel, and respectfully petitions this Court to vacate its order entered herein on October 13, 1952, denying Petitioner's petition for writ of *certiorari*, and, for the reasons and upon the grounds herein stated, grant such petition for certiorari under Rule 33.

The grounds assigned and relied upon are as follows:

Notice of the filing of brief for respondent in opposition to the petition was not timely given (Rule 38, Revised to December 1, 1951). Rejection and non-consideration thereof by the Court should have been the consequence as we interpret this Rule, and no re-

ply was filed on behalf of Petitioner. Whether consideration was given to the brief in opposition by the Court in determining its action upon the petition for *certiorari* is not known, but if consideration was given, with respect we bring to the attention of the Court observations herein which we deem pertinent and proper as bearing upon the facts and principles of law claimed or asserted in such brief.

The brief states on page 3: "* * * and in 1911 it (the cause) was stricken from the docket of the Pike Circuit Court". (Parenthetical matter supplied). Such statement does violence to the established facts found in the Record and is contrary to the finding of the Kentucky Court (246 S. W. (2d) 984). If the statement alluded to was true (assuming as a matter of course that the Court had acted after due notice at the time to Taylor and there was none) legal and moral justification for the application of the equitable doctrine of laches might exist, as by his own *in pais inertia*, could in many cases be appropriately denominated and construed as due process of law and the taking of Petitioner's property could be constitutionally justified. But even under such circumstances, if a court of equity, in the administration of an equity case has sequestrated the property of a litigant, such as was accomplished in the instant case, passive acquiescence on the part of the litigant, such as is now claimed by the respondent against the Petitioner as having occured, would not, and could not, in this Court be construed either as a fulfillment of due process requirements, or, alternately as the annihilation of the defense of due process. *Taylor* v. *Carryl*, 20 How. 583; *U. S.* v. *Lawton*, 110 U. S. 146.

The present cause, however as the record shows at all times remained on the Kentucky court's docket, with the

duty of concluding the litigation resting squarely on the shoulders of the Commonwealth. If the Commonwealth intended to abandon the litigation during the ensuing years, equity and good conscience clearly would demand some notification thereof to the Petitioner, whom it had voluntarily brought into the litigation and whose property it had sequestrated. No such notice was given.

The Kentucky court's decision in the present instance rested solely upon laches and such not only erroneously applied this doctrine to the detriment of the rights of a litigant upon whom there was no duty to proceed but of greater importance to a Federal Court deprived Petitioner of his rights in the pending litigation to share in the proceeds of sale of the forfeited lands, in violation of his rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States as expressly held by this Court in *U. S.* v. *Lawton, supra.*

Proceeding under the belief that this Court heretofore determined to deny the petition for certiorari under the mistaken conception, created by respondent's brief and the inapposite authorities cited which deal with laches *in pais*, that the relief sought by Petitioner is from a final adjudication of the Kentucky court rendered in the year 1911, rather that an adjudication in a pending cause, Petitioner respectfully requests that reconsideration be given to his petition, and that an order be now made rescinding the order herein entered on October 13, 1952, which denies him a writ of *certiorari* as prayed.

Acting upon the assumption that this Honorable Court may have considered the respondent's brief in its deliberations in acting upon our petition for writ of *certiorari*, we ask the indulgence of the Court on behalf of Mr. Taylor the consideration of the following observations, as a reply to such brief.

The short reply of respondent carries two headings, namely, (1) "No Grounds Exist Herein For The Granting Of Certiorari" and (2) "The Merits Of The Case". As the principal authority relied upon in each instance is the decision of Mr. Justice Brewer, reported in *Moran* v. *Horsky*, 178 U. S. 205, we may treat both points as one. It is our contention however, that this case sustains our theory of the case; as likewise does the case of *Gibson* v. *Chouteau* 13 Wall. 20 (80 U. S.) 20 L. Ed. 534.

It is first contended by Respondent that the decision rendered by the Kentucky Court in the instant case turns solely upon the construction of the doctrine of laches and consequently such involves no Federal question. We quote from counsel:

> "Such decision involved only the construction of *a state statute*, and the determination of *the law of the state*, i. e., whether the asserted right of the petitioner was barred by the defense of laches." (Italics supplied)

The brief cites no Kentucky statute as governing or bearing upon the questions. In fact, there is no Kentucky statute defining laches; and counsel furnish no Kentucky case to support the proposition that the common law or case law of the State of Kentucky is in accord with or supports the decision here brought under review unless the decision rendered by the Court in this case in December 1951, can be accepted and taken as a reversal of the previous decisions of the Kentucky court, cited with approval by the Court, found in the former opinion of Judge Rees (Record page 42 at p 44). In the former opinion Judge Rees says:

> "Delay alone is not sufficient to constitute laches."

The authorities cited by him amply sustain this point as well as the corollary which follows:

> "It must be delay that works disadvantage to another."

Then follows his review of the case and his concept of the law of laches as previously understood by the courts at large, and it holds that the State of Kentucky, the plaintiff in this cause, has not been injured, nor any other party of interest therein affected.

In the second opinion rendered in the case, the opinion now under review by this Court, Commissioner Stanley introduces an altogether new theory as to the rights of those who may be considered and affected in a chancery cause when instituted by a sovereign state, and differing from Edmund Burke, he includes the whole Commonwealth. His concept is very broad. He cites no decision in its support and we have found none. That there may be no mistake through paraphrasing, we ask the indulgence of the Court to quote from page 987 (240 of S. W. (2nd), page 987).

> "That which the Commonwealth, acting as sovereign of all the people, achieved through the travail of years of legislation and litigation, namely, clearing the confusion of titles, would, in a large measure, be lost. *The Commonwealth has the same sovereign power now to represent the people to conserve that accomplishment.* The policy of the state is to stabilize titles. Upon that rests security and prosperity, a matter of primary concern. How then can it be said that the element of prejudice to the Commonwealth is lacking so that the presumption of an abandonment and acquiescence by the appellant should not prevail?" (Italics supplied)

If this concept of the law now for the first time advanced can be adopted and considered sound, are we not brought to the irresistible conclusion that there was no necessity for the State of Kentucky to have adopted the Forfeiture Act of 1906? Can it seriously be considered that the positive requirements of this law which was held constitutional solely upon the ground that the State of Kentucky afforded to the holder of the Virginia grant involved a course of procedure resting upon "office found" or its equivalent, would it not of necessity be followed, or that petitioner's rights would be protected by this Court when such procedure had not only not been followed but was abandoned?

The question therefore as to what circumstances in an ordinary case justify the application the defense of laches is not here involved, and furthermore, as we read the single case brought to the attention of the Court in the reply brief, namely, *Moran* v. *Horsky, supra,* Justice Brewer recognized the distinction existing between lands or grant actually held by a sovereign state and such as were in the process of being acquired. This view is strengthened by the opinion found in the case of *Gibson* v. *Chouteau,* 13 Wallace, 92.

The question as to what circumstances would or would not justify the application of the doctrine of laches in an ordinary case is more or less a ***non sequitur*** in the present instance. Certainly it is wholly inapplicable if this Court should arrive at the conclusion that the action and procedure followed by the State of Kentucky when successfully accomplishing the forfeiture of the Virginia grants must be considered as governed and controlled by its own statutes expressly designed for such purposes when fortified by the several decisions of this court which recognize the necessity for the equivalent of *office found,* such decisions commencing with *Fairfax's Devisees* v. *Hunter's Lessee* (1913), 7 Cranch 602, and extending through *Bennett* v. *Hunter,*

(1870), 9 Wall. 326. The issue of laches or no laches can have no bearing upon the subject involved for if it be conceded, as it must be conceded under these decisions, that the sale of the subject matter, or grant, is a *sine qua non* for the *passing of title to the State of Kentucky* there could be no change in the relationship of the parties until such sale had been made.

This question necessarily involves a constitutional question respecting the effect or fulfillment of due process of law, and hence no situation could arise in the state court involving a question of laches until the condition precedent, namely, the sale provided under the Act of 1906, has been had.

For the foregoing reasons Petitioner, by his counsel, respectfully requests an award of a writ of certiorari.

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I, Alexander H. Sands, Attorney for Petitioner George H. Taylor, do certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the grounds specified therein.

ALEXANDER H. SANDS,
Counsel for Petitioner.

October 24, 1952.